INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:	
Kaiser Aluminum & Chemical Corp. v. *United States*, 181 Ct. Cl. 902, 388 F. 2d 317	4
Kaiser Aluminum & Chemical Corp. v. *United States*, 187 Ct. Cl. 443, 409 F. 2d 238	5
United States v. *Seckinger*, 397 U.S. 203	7
United States Constitution:	
Fifth Amendment	9
Fourteenth Amendment	9
Constitution and statute:	
28 U.S.C. 2501	4

428-395—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1725

REYNOLDS METALS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–11a) is reported at 438 F. 2d 983.

JURISDICTION

The judgment of the Court of Claims was entered on February 19, 1971, and the petition for a writ of certiorari was filed on May 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly construed a "most favored seller" clause contained in petitioner's contract with the United States.

STATEMENT

In 1950 and 1951 the United States entered into contracts with three aluminum companies, including petitioner, in which the companies agreed to construct additional facilities and produce specified quantities of primary aluminum. The United States agreed to purchase any part of the additional production that the companies could not otherwise dispose of (Pet. 6).

During the course of the negotiations, the General Services Administration sent each prospective contractor a letter in which it committed the United States to allow the contractor to adopt contract terms negotiated by GSA with one of the other contractors, if in the contractor's opinion such terms were more favorable to it than those contained in its own contract. The letter to petitioner provided as follows (Pet. App. 2a):

> This is to confirm my telephone conversation with you of this morning. You will recall that I officially committed this Administration to amend any agreement we might reach on the expanded capacity of your company if later agreements with the Aluminum Company of America and/or the Kaiser Aluminum and Chemical Company are, in your opinion, more favorable than the agreement which has been executed with you.
>
> Such amendments will be for the purpose of bringing your contract into conformity with agreements of the aforesaid companies.

Subsequently, petitioner was given the opportunity to amend its contracts in accordance with this agreement (*id.*).[1]

In addition to providing petitioner with the opportunity to obtain the same contract terms, the government accorded those terms the same interpretation for each producer. Thus, in 1957 when a question arose with regard to the proper method of computing additional production under the contracts, Kaiser Aluminum and Chemical Company informed the government that in its view the companies were entitled to exclude, from production the government would buy, any "off-grade" (*i.e.*, less than 99 percent pure) aluminum (Pet. 7).[2] Reynolds immediately informed the General Services Administration that if Kaiser were accorded this treatment in computing its production, Reynolds would insist upon the same administrative interpretation for its production pursuant to the "most favored seller" agreement. Kaiser's claim was submitted to the Comptroller General by GSA, which informed that office of Reynolds' view of its rights (Pet. 8). The Comptroller General declined to act upon Kaiser's claim (see Comp. Gen.

[1] These letters, which also affirmed the original agreement, were attached to petitioner's petition in the Court of Claims, and are reproduced as an addendum to this brief, *infra*, pp. 1a–3a.

[2] If the off-grade production were excluded from the producer's computations, the producer would be entitled to tender or "put" to the United States additional quantities of aluminum until the total weight that the United States agreed to buy was reached.

Dec. B–135893, June 6, 1958), and the United States therefore refused to accept the additional aluminum tendered by Kaiser (Pet. 8).

In 1963, within the six-year period provided by 28 U.S.C. 2501, Kaiser brought suit in the Court of Claims, contending that the United States had broken the contract provisions dealing with its obligation to buy the additional production (Pet. App. 16a).[3] Although petitioner's contract contained the same "additional production" provisions, and petitioner was aware of Kaiser's suit, petitioner took no steps to claim or enforce its rights under the contract (Pet. App. 7a).

On December 15, 1967, the Court of Claims entered judgment for Kaiser. *Kaiser Aluminum & Chemical Corp.* v. *United States,* 181 Ct. Cl. 902, 388 F. 2d 317 (Pet. App. 12a–46a). Proceeding on the factually incorrect assumption that petitioner had been allowed by the United States to exclude its off-grade aluminum (Finding of Fact 42, 181 Ct. Cl. at 958), the court concluded that Kaiser was entitled to the same administrative treatment.[4] Thereafter, when the gov-

[3] In the alternative, Kaiser contended that its competitors had been permitted to exclude their off-grade production, and that under its own "most favored seller" clause, Kaiser was entitled to the same treatment from the United States (Pet. App. 49a). The United States had not in fact accorded such treatment to petitioner or any other competitor of Kaiser.

[4] As the Court of Claims later explained, "[w]e did discuss the contract issue at length, but as the case was presented to us, the most favored nation ground seemed to provide a clear and sufficient basis for Kaiser's recovery on both the alloy and offgrade issues, and resolution of the contract ambiguities was made unnecessary thereby" (Pet. App. 52a).

ernment brought this error to the court's attention, the court reaffirmed the judgment for Kaiser, holding that:

> [W]e can no longer view the offgrade issue as clearly settled under the most favored nation theory; however, we find the solution to the offgrade issue in the contract terms * * *. We now hold that Kaiser is and was entitled to recover on the offgrade issue because of defendant's breach of contract in not allowing Kaiser to exclude offgrade in measuring its "additional production" under Article I of the contract. * * *

Kaiser Aluminum & Chemical Corp. v. *United States,* 187 Ct. Cl. 443, 450–451, 409 F. 2d 238, 242 (Pet. App. 54a).

Subsequent to the first *Kaiser* decision, petitioner brought this suit in the Court of Claims, contending (since it was too late under the statutory time period to sue to enforce the "additional production" provision of its contract, as Kaiser had done) that it was entitled to the same benefits that Kaiser had been awarded by the judgment in Kaiser's favor (Pet. 9). Petitioner's theory was that its "most favored seller" agreement entitled it not only to the same contract terms and interpretation given other contractors by the United States, but also to any benefits awarded by the Court of Claims to other contractors who brought suit against the United States.

In ruling against petitioner, the Court of Claims held that the "most favored seller" provision used by the parties was not susceptible of this construction, for "GSA did not guarantee that Reynolds would

wind up in the same position, economically, as Kaiser or any other seller" (Pet. App. 6a). The government's "narrower obligation" only "entitled Reynolds to the same terms, if it wished, as those granted the other producers, and to uniform interpretation of those terms by GSA" (*id.*). These conditions had been met by the government, and—

> it would put too much of a strain on the language of the clause to say that, in these circumstances, it secures to Reynolds any advantage Kaiser happens to receive from any arm of the Federal Government. The clause * * * is framed solely as an obligation of the GSA itself. Even if the words can be read as binding other executive agencies, it is hard to stretch them further to blanket the courts * * *. The clause is not phrased that way * * *. [Pet. App. 8a.]

In addition to the fact that the contract provision would not support the interpretation sought to be given it by petitioner, the court indicated that it could "see no basis in logic or policy" supporting petitioner's position. Such a construction "would allow a party with such a clause to sit comfortably in the shade while another does battle for his rights, and if the more industrious seller should prevail, his counterpart could leave his cool retreat to share in the bounty" (Pet. App. 7a). The "most favored seller" clause, the court reasoned, "should not relieve a party of the duty to vindicate his own rights in timely fashion where, as here, he can do so just as easily as his rival" (Pet. App. 7a–8a).

ARGUMENT

The resolution of this case involves nothing more than the construction of the particular language of the "most favored seller" agreement entered into by petitioner and the United States. The Court of Claims' reading of the agreement fully accords with its plain terms and is correct. In addition, the decision is without prospective importance since such agreements are not common to government contracts,[5] and any future agreements may be so written as to provide the result petitioner seeks, should the parties desire this. There is no conflict with decisions of this Court or the lower federal courts that have construed other "most favored seller" agreements. Further review by this Court is therefore unwarranted.

1. Petitioner's contention that the agreement entitles it not only to the equal treatment it concededly received from the United States, but also to any benefits its competitors receive from the courts, finds no support in the terms of the agreement itself. Nothing in the language of the letters, which constitute the "most favored seller" clause (see *infra*, pp. 1a–3a), even suggests the broad construction petitioner advocates. Nor did petitioner introduce below any contemporary evidence beyond the agree-

[5] We are informed by the General Services Administration that it has used similar "most favored seller" agreements on only two other occasions where the programs are not completed, and that no litigation involving those agreements is pending. Consequently, the factors that motivated the granting of certiorari in cases involving other government contract terms, *e.g.*, *United States* v. *Seckinger*, 397 U.S. 203, 204, are absent here.

ment itself to support its position. The short of the matter is, as the Court of Claims correctly concluded, the agreement simply "did not guarantee that [petitioner] would wind up in the same position, economically, as * * * any other seller" (Pet. App. 6a).

Moreover, there are no equitable considerations supporting the result petitioner seeks. Petitioner was certainly aware of Kaiser's view that the "additional production" provisions common to both their contracts would allow Kaiser to exclude off-grade aluminum; indeed, when Kaiser sought this interpretation from the United States, petitioner immediately informed the government that it felt it would be entitled to the same benefit as Kaiser (Pet. 8). Although also aware that Kaiser brought suit on those provisions within the statutory time period (Pet. App. 7a), petitioner made no effort to join in the suit to enforce its similar contract right. Long after the statutory time period to assert that right had expired,[6] petitioner brought this suit claiming that since Kaiser had successfully asserted its right under the "additional production" provisions in the Court of Claims, it too was entitled to the same benefits from the United States. But as the Court of Claims pointed out, the "most favored seller" agreement "is neither an unnecessary exten-

[6] Petitioner's cause of action under the "additional production" provisions of its contract accrued, at the very latest, when the government made final payment in February, 1961, some seven and a half years before this suit was brought (Pet. App. 4a). Petitioner could have brought suit as early as June 1958, when the United States declined to exclude off-grade aluminum from Kaiser's production, and thus also from petitioner's (Pet. 8).

sion of the limitations period nor a refuge for the indolent or the free-rider" (Pet. App. 8a).

2. As we have noted, the agreement did not guarantee petitioner that it would end up in the same economic position as other contractors; the United States agreed only to accord petitioner the same terms and the same administrative construction of those terms that it accorded other contractors. Since the United States concededly carried out this obligation, there is no basis for petitioner's contention (Pet. 10–13) that the decision violates the agreement or impugns the government's business integrity. Nothing in the court's opinion precludes the United States from entering into "most favored seller" agreements that entitle contractors to the benefits of whatever their competitors receive from successful court action. But the United States did not enter into such a contract here. Consequently, petitioner's contention that its property was taken in violation of the Fifth and Fourteenth Amendments (Pet. 19–20) is without substance.

Finally, contrary to petitioner's assertion (Pet. 20–23), the decision below does not conflict with lower federal court decisions concerning the time when a cause of action accrues under a "most favored seller" agreement. The decisions upon which petitioner relies (Pet. 21–22) merely hold that the cause of action accrues at the time one party to the "most favored seller" agreement grants the particular benefit covered by the agreement to a competitor; and in each of these cases the event triggering the right to equal treatment was spelled out in the agreement. Here the

United States did not agree that whenever one of the other aluminum producers recovered a judgment in the Court of Claims it would provide the same benefits to other producers. Thus the holding below is not, as petitioner contends (Pet. 20), that its cause of action was barred before it arose; the Court of Claims held rather that petitioner had no cause of action under the "most favored seller" agreement when the United States accorded it precisely the same treatment it accorded other aluminum producers (Pet. App. 9a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

L. PATRICK GRAY, III,
Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM D. APPLER,
Attorneys.

JUNE 1971.

EXHIBIT A

GENERAL SERVICES AMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., November 24, 1950.

Mr. RICHARD S. REYNOLDS, JR.,
President, Reynolds Metals Co.
Richmond, Va.

DEAR RICHARD: This is to confirm my telephone conversation with you of this morning. You will recall that I officially committed this Administration to amend any agreement we might reach on the expanded capacity of your company if later agreements with the Aluminum Company of America and/or the Kaiser Aluminum and Chemical Company are, in your opinion, more favorable than the agreement which has been executed with you.

Such amendments will be for the purpose of bringing your contract into conformity with agreements with the aforesaid companies.

Sincerely yours,

JESS LARSON,
Administrator.

EXHIBIT B

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., August 25, 1951.

REYNOLDS METALS COMPANY,
Washington, D.C.

GENTLEMEN: In connection with the contract between your company and the Government for the production and sale of 500,000 short tons of primary aluminum pig executed on July 18, 1951, as of December 19, 1950, you will recall that it was agreed that you would be furnished with copies of similar contracts with the Aluminum Company of America and Kaiser Aluminum & Chemical Corporation for your review and adoption, if desired, of terms contained therein which might be in variance with the corresponding terms in your contract. Pursuant to such agreement, similar contracts with the above two companies are herewith enclosed.

If upon review of the enclosed contracts, you should desire any amendments of your contract with the Government to correspond with the terms in either one of the two enclosed contracts, your request for such an amendment must be submitted to this Administration on or before October 1, 1951.

It is understood, of course, that the word "term" is used in its broad sense and that a request for amendment or substitute must relate to the term as a whole and not be confined to particular parts or provisions thereof.

Sincerely yours,

JESS LARSON,
Administrator.

Enclosures.

EXHIBIT C

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., May 6, 1954.

REYNOLDS METALS COMPANY,
Richmond, Va.

GENTLEMEN: In connection with Contract No. GS–OOP(D)–12214 between your Company and the Government, for the production and sale of primary aluminum pig, it was agreed that you would be furnished with copies of similar contracts which were being negotiated at that time and that you would be permitted to adopt, if you desire, the terms contained therein which might be at variance with the corresponding terms in your contract.

Pursuant to such agreement, there are enclosed copies of Contract GS–OOP(D)–12096 between the Government and the Auminum Company of America, and Contract GS–OOP(D)–12143 between the Government and Kaiser Aluminum & Chemical Corporation.

If, upon review of such contracts, you should desire any amendment to your contract with the Government to correspond with the terms of either of such contracts, your request for such an amendment must be submitted to this Administration within thirty (30) days following your receipt of this letter.

It is understood, of course, that the word "term" is used in its broad sense, and that a request for amendment must relate to the term as a whole and not be confined to particular parts or provisions thereof.

Sincerely yours,

MAXWELL H. ELLIOTT,
General Counsel.

Enclosures (2).

U.S. GOVERNMENT PRINTING OFFICE: 1971